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CONSULTANT SELECTION FOR THE PROPOSED NEW BRAINTREE PRISON SITE

Joseph R. Barresi
Inspector General
May, 1989

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CONSULTANT SELECTION FOR THE
PROPOSED NEW BRAINTREE PRISON SITE

EXECUTIVE SUMMARY

The Office of the Inspector General has conducted an inquiry into the State's selection of a consultant to write an Environmental Impact Report (EIR) for the proposed siting of a medium security prison at the Pioneer Valley Academy in New Braintree. Staff in the Office reviewed documents relating to this procurement and conducted interviews with participants in the selection process. During the course of its inquiry, the Office received the full cooperation of all participants.

The Inspector General has found no evidence of criminal wrongdoing nor does he have any reason to doubt the dedication of the participants in this procurement. Furthermore, nothing in this report is intended to question the qualifications of any applicant, nor to judge the sufficiency of the consultant's work product.

However, the inquiry did identify a number of instances in which the Designer Selection Board (DSB) and the Division of Capital Planning and Operations (DCPO) -- the two agencies with the responsibilities of selecting and hiring design consultants for State building projects -- compromised the decision-making process and disregarded key safeguards. Moreover, poor managerial decisions by the DCPO have resulted in months of unnecessary delay in the construction of a medium security prison in New Braintree.

The major findings in this report include the following:

- It took the Commonwealth fifty weeks to select an EIR consultant for this project. Nothing in the designer selection law itself requires such a lengthy procedure.
- The selection criteria included in the DSB's public notice were not specific to the needs of this project and were too vague to provide an adequate basis for selecting a consultant.
- The DSB did not fully comply with explicit requirements of the designer selection law.
 - The law requires the DSB to transmit to the DCPO the names of the three top-ranked consultants. The list of finalists the DSB sent to the DCPO improperly included a firm which had withdrawn from the competition.
 - The law directs the DSB to provide the DCPO with a written statement articulating the reasons for its ranking. The statement the DSB furnished the DCPO failed to do so.
 - The law mandates that the DSB review qualifications and rank applicants. The DSB, however, failed to fulfill its statutory mission by improperly relying on the DCPO to conduct its own review.
- The DCPO compromised open and fair competition. The DCPO used criteria which were of doubtful relevance and rejected, through a process vulnerable to favoritism, the firm that had been ranked first by the DSB.
- The DCPO, circumventing essential safeguards against fraud, waste, and abuse, permitted the cost of the contract to escalate from an advertised fee of \$75,000 to more than \$535,000.
- Both the DCPO and the DSB inadequately documented their decision-making processes. They thereby deprived the public of an essential tool for holding public agencies accountable for their decisions.
- The DSB has neither adequate staff resources nor sufficient autonomy from the DCPO to fulfill its responsibilities.
 - Due to a lack of adequate staff resources, the DSB relies on the DCPO in a manner which undercuts the

process the Legislature enacted to ensure a fair and reasoned selection.

- The DSB's independence from the DCPO has been impaired. Although the DSB was established to be independent, its budget and even the performance evaluation of its staff have, in fact, been made subject to the approval of the Deputy Commissioner of the DCPO.

These findings dictate the need for corrective action. Among the recommendations the Inspector General makes in this report are the following:

- The DCPO should improve its management of the Commonwealth's priority construction projects. The DCPO should establish clear priorities and systems for implementing those priorities. The DCPO should communicate priorities to its staff and the DSB, and ensure that those priorities are reflected in project implementation.
- The DCPO and the DSB should jointly develop a scheduling system which sets a timetable for each selection. This system should include a monitoring mechanism to alert both agencies to any deviations from the schedule.
- The DCPO and the DSB must abide by the Ward Commission reforms reflected in the designer selection law. This would include, at a minimum, the following:
 - The DSB, in collaboration with the DCPO, should identify clear, specific selection criteria before applications are solicited and ensure that the criteria are tailored to the actual needs of the project.
 - All selection criteria should be publicly advertised, and the DSB's ranking should be based solely on the advertised criteria.
 - The DSB, not the DCPO, should interview applicants in those cases where interviews are necessary.
 - Once it has ranked the applicants, the DSB should provide the DCPO with a clear and unambiguous statement, based on the published evaluation criteria, of the reasons for its ranking of each finalist.

- The DCPO should award the design contract to the top-ranked firm except in those limited instances where there is a compelling reason not to do so. The DCPO must base its decision solely on the criteria included in the public notice. The DCPO should maintain written records which fully document the reasons for its decision.
- Before submitting a project to the DSB, the DCPO should make all reasonable efforts to define the scope of work and estimate the total cost. All design services for which a consultant will be responsible, whether directly or through a subconsultant, should be included in the advertised scope of services. If, as work proceeds, the DCPO sees a need for unanticipated or additional services that would significantly increase the contract cost, the new or expanded services should be procured through the DSB.
 - The DCPO and the DSB should document fully, contemporaneous with its occurrence, each step of the selection process.
 - The DSB should ensure that only the names of bona fide applicants are transmitted to the DCPO and should adopt written procedures to be followed when fewer than three qualified applicants respond to a solicitation.
 - The Secretary of Administration and Finance and the Legislature should act to ensure the DSB's independence from the DCPO. The DCPO should neither control the DSB's budget nor evaluate the DSB's employees.
 - The Secretary of Administration and Finance should take immediate steps to ensure that the DSB is provided with sufficient professional and clerical staff support. By reallocating a limited number of positions from the DCPO, the Secretary can provide the resources needed to ensure that functions which are properly the DSB's are performed by the DSB.

INTRODUCTION

In June, 1986, the Administration requested legislative approval to site a 500-bed medium security prison at the Pioneer Valley Academy (PVA) in the town of New Braintree.¹ Two months later, the Secretary of Environmental Affairs determined that State law required the preparation of an Environmental Impact Report (EIR) for the proposed project. According to the Secretary, the EIR was to assess such diverse matters as the socioeconomic impact of a prison on the surrounding community and the capacity of the site's groundwater systems to support the proposed correctional facility.

The Division of Capital Planning and Operations (DCPO), as the State's building construction agency, undertook the preparation of the EIR at the request of the Department of Correction in August, 1986. Having determined that a consultant was needed to produce the EIR, the DCPO turned to the Designer Selection Board (DSB) to advertise the contract and select the finalists for the EIR study consultant. By statute, the DSB has jurisdiction over the selection of designers for State agency building projects.²

This report of the Office of the Inspector General (hereinafter, the Office) deals with certain events and decisions between August of 1986 when the EIR consultant selection process began and September of 1988, when the DCPO

¹By Chapter 658 of the Acts of 1986, the Legislature in December, 1986, authorized the DCPO to expend \$72 million for the construction of two medium security correctional facilities. New Braintree was not specifically named; the DCPO was to complete a feasibility study prior to acquiring any site.

²G.L. c.7, §38C(a).

issued the Final EIR. The chronology which follows provides a context for the findings and conclusions in this report.

BACKGROUND

Consultant Selection

Late in September, 1986, DCPO staff submitted to the DSB Executive Director a draft of a public notice seeking a consultant for the EIR project. After recommending to DCPO staff several modifications to the notice, the DSB Executive Director advertised for the EIR consultant on November 14, 1986. According to the public notice, the designer's fee was not to exceed \$75,000 and field data collection was to be a reimbursable expense. Consistent with past practice, no estimate of so-called "reimbursables" was included in the public notice. Applications were due by December 8, 1986.

Three firms submitted applications to the DSB: The BSC Group (BSC), based in Boston; Capital Program Management, Inc. (CPM), based in New York City; and WCH Industries, Inc. (WCHI), based in Waltham. The DSB postponed ranking the three firms because none of the firms appeared to possess all of the qualifications specified in the public notice.³ The DSB, rather than readvertising, opted to request additional information from the applicants.

³The DSB's rationale for the delay was explained by DSB members and staff during interviews with the Office. (The DSB minutes for the March 5, 1987, meeting provide no clue as to the reason the DSB postponed its decision.) The DSB interviewees said that DCPO staff had initially reviewed the applications, determined that none of the three firms appeared to meet all the requirements listed in the public notice, and communicated this preliminary assessment to the DSB.

A DCPO staff memorandum suggests that the DSB rejected the option to readvertise the project, in part, because DCPO staff was concerned that a delay would impede the Administration's commitment to acquire the site and would, thus, forestall commencement of prison operations. Instead, at the direction of the Board, the DSB Executive Director wrote to each applicant requesting supplementary material.

By its March 19 meeting, the DSB had received supplementary material from only two of the three original applicants: WCHI and CPM. BSC withdrew its application by letter dated and received by the DSB on March 18, 1987. That same day, the DSB Executive Director telephoned BSC.⁴ When the BSC representative confirmed that the firm did not want the job, the DSB Executive Director asked if the firm would be willing to remain on the list. The firm agreed, and the Executive Director wrote at the top of BSC's withdrawal letter that the "application need not be withdrawn but they did not want to be ranked first." The inappropriateness of including BSC in the list of finalists will be discussed further in Finding 2.

At its March 19 meeting, the DSB ranked the finalists in the following order: (1) WCH Industries, Inc.; (2) Capital Program Management, Inc.; and (3) The BSC Group. In a March 20, 1987, letter to the DCPO Deputy Commissioner, the DSB Executive Director transmitted the list of rank-ordered finalists and attached the applications, supplementary

⁴During an interview with the Office, the DSB Executive Director said that he called because he questioned the authority of the signatory to withdraw BSC from the competition. The signatory, who was the Manager of Environmental Sciences for BSC, confirmed that he was authorized to withdraw the firm from consideration. The firm's representative said in an interview with the Office that he had withdrawn the application because the firm was too busy with other work.

materials and letter of withdrawal from BSC (with the misleading handwritten notation suggesting that the withdrawal was inoperative). The top-ranked firm, WCHI, received a copy of the DSB's March 20 letter to the DCPO Deputy Commissioner and concluded that it would receive the contract.

In a letter dated April 24, 1987, the DCPO Director of Programming notified the top-ranked firm (WCHI) that its services as a designer had been authorized by the Deputy Commissioner of the DCPO. Included with the notification were copies of a contract to be signed by WCHI and returned to the DCPO.

At about the same time that she notified WCHI of its appointment, the Director of Programming instructed the DCPO study manager to arrange interviews with the two top-ranked firms. Unaware that WCHI had already been sent a contract, the study manager contacted WCHI and CPM to arrange the interviews.

DCPO staff from the Office of Programming and DCPO's newly created Corrections Special Unit conducted interviews with WCHI and CPM. DCPO attendees at the interview -- including the Director of Programming who had signed the April 24, 1987, notification letter to WCHI -- maintained in interviews conducted by the Office that they did not know, at the time, that the letter had been sent to WCHI.

Staff from the Office conducted separate interviews with two representatives of WCHI. Each said he thought that WCHI had been chosen for the job prior to the April 28, 1987, meeting with the DCPO. Indeed, the contract had arrived at WCHI's Waltham offices by the time the two men returned from their April 28 interview with the DCPO.

In a memorandum dated May 28, 1987, the Director of Programming recommended to the Deputy Commissioner that "based on CPM's greater experience in this very specific project type, the DCPO withdraw its appointment of WCH Industries and appoint Capital Planning Management, Inc[.,] as the study consultant for the Pioneer Valley Academy EIR study, and that [the] DSB be informed accordingly." That same day, the DCPO Deputy Commissioner informed both the DSB and WCHI of this decision.

WCHI contends that it was not informed of the purpose of the April 28 interview and was, consequently, not prepared to present its case effectively. In a letter protesting DCPO's withdrawal of the contract, the President of WCHI stated:

[W]e do not view the discussion we had with [the] DCPO as one to further evaluate our qualifications while apparently CPM was invited in with the express purpose of further considering their credentials for the project. Obviously, they would have come prepared to offer their best credentials. We feel this represents an unfair comparison and [is] not in the spirit of fair play.⁵

In responding to WCHI by letter dated June 24, 1987, the Deputy Commissioner of DCPO maintained that both firms had been treated equally.

The DCPO subsequently entered into contract negotiations with CPM to produce the EIR. CPM signed the consultant contract July 24, 1987. The Director of the Corrections Special Unit sent a copy of the executed contract to CPM on August 7, 1987, at which point work on the study could officially begin.

⁵This excerpt is from a letter from William C. Harrison, President of WCHI, to John I. Carlson, Deputy Commissioner of the DCPO, dated June 5, 1987.

EIR Report

In September, 1988, more than a year after selecting CPM, the DCPO released the Final EIR.⁶ The lengthy, 50-week selection process had pushed field data collection into the winter months, causing further delays because of cold weather. Moreover, unique underground formations were discovered which necessitated further testing, and the DCPO also commissioned surveys through the EIR consultant which the DCPO had erroneously assumed were available from owners of the site. Due to these and other factors, the actual cost to produce the EIR escalated from an advertised fee of \$75,000 to a total amount which could exceed \$600,000 -- without the benefit of the DSB's oversight or adequate cost containment measures.

⁶The Secretary of Environmental Affairs certified the sufficiency of the Final EIR on November 15, 1988.

FINDINGS AND CONCLUSIONS

Finding 1.

Selecting An EIR Consultant Took Nearly A Year -- Far Longer Than Necessary Under The Designer Selection Law

Fifty weeks elapsed between the time the DCPO was notified of the EIR requirement and final execution of the contract with the EIR consultant. That period is excessive and pushed back the Administration's timetable for constructing the new prison.

Advertising for, evaluating and selecting the EIR consultant proceeded at a slow pace, particularly in light of the importance top Administration officials had accorded the project.⁷ In this instance, the following factors contributed to the amount of time consultant selection consumed:

- Following notification in August, 1986, of the need for producing an EIR, the DCPO took more than a month to transmit a draft of a public notice for the EIR contract to the DSB. The public notice was comprised of items drawn directly from the Secretary of Environmental Affairs's letter and appears to have entailed little additional analysis by DCPO or DSB staff.
- Another one and one-half months passed before the project was advertised by the DSB in November, 1986.

⁷In a June, 1986, report on prison overcrowding to the Chairmen of the House and Senate Committees on Ways and Means, Frank Keefe, then Secretary of Administration and Finance, had predicted that the New Braintree site would be able to accommodate inmates "very soon" after it was acquired. In a newspaper interview published by the Boston Herald in July, 1987, the Secretary of Human Services was quoted as saying: ". . . [T]he easiest facility, the quickest facility for us to move into without having a nuclear meltdown politically, is New Braintree. We just have to change the sheets on the beds and put a fence around the perimeter and we can put 250 inmates in there."

- Three months passed between the December, 1986, application deadline and the DSB's first consideration of the applicants in March, 1987.
- Nearly three months elapsed between the DSB's March 20, 1987, letter to the DCPO ranking the applicants and the DCPO's appointment of the second-ranked firm. The DCPO conducted interviews of the top two firms and requested additional information from the firms during this time.
- Another two months went by while the DCPO negotiated the contract and processed the paperwork. The fully executed contract was finally sent to CPM in August, 1987.

At least one conclusion may be drawn from the preceding chronology: the sense of urgency publicly expressed by some top administration officials regarding a prison in New Braintree had not permeated the DSB or the DCPO.⁸ Each of the time periods enumerated above could have been reduced substantially had completion of this project been accorded a higher priority.

Agencies of the Commonwealth have occasionally attributed delays in building projects to the requirements of the Ward Commission reforms. That was not the cause here. Nothing in the designer selection law requires that a selection take nearly a year, or even close to that length of time.⁹

⁸The New Braintree project was not, in fact, accorded a high priority within the DCPO until the fall of 1987. The Deputy Commissioner has informed the Inspector General that he made the choice to accord a higher priority to other projects, most notably the four design-build prison projects authorized by the Legislature in late 1985 and early 1986. As the Inspector General has previously observed, the DCPO experimentation with design-build requires a prodigious investment of time and effort by DCPO staff. The New Braintree schedule suffered as a direct result.

⁹The designer selection law sets only one time requirement: each contract for design services must be publicly advertised at least two weeks prior to the deadline for filing applications. [G.L. c.7, §38D(a)]. The timing of
(continued...)

Unimpeded by the deficiencies discussed throughout this report and accorded a very high priority, selection of a consultant for this project could have been completed in a quarter of the time -- or less.¹⁰

In order to improve its management of the Commonwealth's high-priority construction projects, the Inspector General recommends that the DCPO and the DSB take the following actions:

- Recommendation 1. The DCPO should establish clear priorities for its projects, articulate these priorities publicly, and communicate these priorities to DCPO staff and the DSB.
- Recommendation 2. The DCPO and the DSB should design and implement a system for scheduling project consultant selection based on the Administration's clearly stated priorities.

⁹(...continued)
all other steps in the process can be compressed at the discretion of the DSB and the DCPO.

¹⁰Another decision by the Deputy Commissioner has effectively postponed the project still further. The Deputy Commissioner decided not to begin work on the full feasibility study -- required under G.L. c.29, §7K -- until the DCPO completed the EIR. The Director of the Corrections Special Unit characterized this decision as a "political" decision based on a concern by the DCPO that residents of New Braintree would object to the preparation of a feasibility study for the facility before the DCPO had finished the EIR. In other public building projects, the Deputy Commissioner has opted to handle the EIR as a sub-component of the study phase rather than handling the study and the EIR as two separate, sequential projects as he did in this case.

The Deputy Commissioner's decision has added several months, and perhaps as much as a year, to the project schedule. It appears that the full feasibility study, of which the EIR was one component, could have been started early in 1987 and could have been completed months before its planned completion in May, 1989.

Recommendation 3. The DCPO and the DSB should establish a monitoring system which alerts both agencies to any deviations from the schedule.

Appropriate action on these recommendations should serve to intensify efforts which, according to the DSB Chairman,¹¹ the DSB has already initiated. For instance, the Board and the DSB Executive Director are identifying methods for expediting the DSB's workload and, according to DSB and DCPO staff, the DSB honors the DCPO's priorities in most cases where project urgency is clearly communicated.

¹¹A new Chairman was appointed between the time of the Office's inquiry and the publication of this report. These observations were made during the Office's interview with the previous Chairman of the DSB.

Finding 2.

The List Of Finalists Improperly Included A Firm Which Had Withdrawn From The Competition

When the Ward Commission, in its Report,¹² called for changes in statutes governing the DSB as then configured, the Commission explicitly stated that:

The DSB will continue to recommend at least three finalists for every contract award, but must rank the finalists in the order of their qualification based on the project criteria.¹³ [Emphasis added].

The Ward Commission's intent is reflected in the language of G.L. c.7, §38F(b) and (c). As both a DSB member and the Executive Director observed in interviews with the Office, the law provides no clear direction as to what the DSB should do if it is unable to identify three qualified applicants.

Only three applicants responded to the advertisement for this contract by the due date of December 8, 1986. One of them, BSC, formally withdrew three months later, when a decision had yet to be made by the DSB and the firm had become too busy to work on this job. Following BSC's March 18, 1987, letter of withdrawal to the DSB, only two bona fide applicants remained in the competition. BSC allowed its name to be added to the list of finalists sent to the DCPO -- but only at the

¹²See Appendix A for a discussion of the Ward Commission reforms. The Ward Commission's findings are set out in its Final Report to the General Court of the Special Commission Concerning State and County Buildings [Ward Commission's Final Report], (December 31, 1980), hereinafter referred to as Report.

¹³Report, Volume 7, p. 239.

request of the Executive Director.¹⁴ The Executive Director's request to BSC had no other apparent purpose than to ensure that the DSB could transmit three finalists to the DCPO.

The Executive Director's request that BSC allow its name to remain on the list was inappropriate.¹⁵ Padding the list of applicants with a firm which had specifically requested to be withdrawn misrepresented the true standing of the firm.

An appropriate course of action, where the DSB is in doubt about its statutory obligation, would be to request guidance from the Department of Labor and Industries (which by law enforces the designer selection law) or from the Attorney General. In this particular case, where the adequacy of the pool and the status of an applicant were apparently in doubt, the DSB should have readvertised. To avoid recurrence of this situation:

Recommendation 4. The DSB should ensure that only the names of bona fide applicants are transmitted to the DCPO and should adopt written procedures to be followed when fewer than three qualified applicants respond to a solicitation.¹⁶

¹⁴In its March 5, 1987, meeting, the DSB was clearly already concerned with the limited pool of applicants, according to staff notes and DSB members' recollections during interviews with the Office.

¹⁵A DSB member who participated in the ranking of firms for the EIR consultant contract explained that the DSB was aware of BSC's initial desire to withdraw but was not aware that the Executive Director had requested that BSC remain on the list.

¹⁶The Ward Commission relied heavily on the American Bar Association's (ABA) Model Procurement Code and stated that the "goals they put forward [are] fundamentally those we recommend." (Report, Volume 7, p. 230.) The ABA describes a sound course of action when fewer than three applicants respond (continued...)

Finding 3.

The Selection Criteria Included In The DSB's Public Notice Were Not Specific To The Needs Of This Project And Were Too Vague To Provide An Adequate Basis For Selecting A Consultant

In 1982, the DSB adopted general criteria for selection of finalists. The list is still in use today.¹⁷ It provides scant guidance to applicants, Board members, or the DCPO for determining whether an applicant is qualified for a particular project. Even when used in tandem with the qualifications and experience listed in the public notice for each project, these criteria are too vague to provide assistance in identifying the applicants best qualified to perform work on a particular project. The general nature of the published selection criteria encourages -- in fact, necessitates -- ad hoc development of criteria after the applications have been opened. The DSB's failure to state clear, specific selection criteria before the competition is underway invites undisclosed and irrelevant criteria to influence the selection.

The DSB's list of so-called selection criteria is little more than an assortment of categories from which clear,

¹⁶(...continued)
to a public announcement: ". . . a second public announcement shall be made. If, after this announcement, there remain fewer than three responses, the Selection Committee shall evaluate the responding firm or firms. . . ." (The Model Procurement Code for State and Local Governments: Recommended Regulations, American Bar Association, August, 1980, R5-501.07.2, p. 135).

¹⁷The DSB adopted the list of "Criteria for Selection of Semi-Finalists and Finalists" on November 2, 1982. According to staff, the list, comprised of 14 categories of criteria, is published with each public notice.

specific criteria could, in most cases, be developed.¹⁸ One category on the DSB's list is "[d]epth of the firm with respect to size and complexity of the project." Nothing in the DSB's list or in the public notice for the project provides a clue as to the meaning of "depth," what would constitute adequate "depth," or what would represent unacceptable "depth." Nor did the notice attempt to communicate either the DSB's or the DCPO's assessment of the "depth" either agency would desire in relation to the "size and complexity" of this project, which consisted of writing an environmental impact report. This is but one example of an ill-defined criterion advertised for this and other projects.

"Geographical location of the firm with respect to the proposed project" and "working relationships with contractors, subcontractors, DCPO staff and agency representatives" are two other examples. These phrases fail to inform the applicant of the agency's preferences and provide no useful standard against which applicants may be judged.

"Geographical location" may or may not be relevant to a particular selection. Without further definition, the phrase is meaningless. The public notice for this project did not specify in what way -- if any -- a firm's location would be

¹⁸The DSB intended the list of selection criteria to conform with the designer selection statute, which states: "The board shall adopt written applicants' criteria for selection of semifinalists and finalists based upon information obtained under section thirty-eight E for each project. The criteria shall include: (i) prior similar experience; (ii) past performance on public and private projects; (iii) financial stability; (iv) identity and qualifications of the consultants who will work with the applicant on the project; and (v) any other criteria that the board considers relevant for any project." [Emphasis added]. [c.7, §38F(a)]. Ward Commission commentary discussed later in Finding 3 clearly demonstrates that these categories were intended as guidance (i.e., permissible categories), not as a substitute for defining precisely what the Commonwealth needed for each project.

evaluated in the selection process. This vague criterion might be used to justify selecting an out-of-state firm over a Massachusetts firm if the former is located closer to the project site; an in-state firm could be chosen over an out-of-state firm because it is closer to the site under study; a less qualified firm could be selected on the basis of mileage to the project site. At bottom, this statement is too vague to be useful to either applicants or evaluators.

The phrase "working relationships" is meaningless. It is difficult to see how either the DSB or the DCPO could define this criterion with sufficient specificity to preclude wholly subjective, standardless judgments. In any event, the phrase "working relationships" has not been defined. Nor has the DSB or the DCPO developed any uniform means of obtaining information that might allow either agency to assess an applicant's "working relationships" or allow an applicant to demonstrate that it had achieved acceptable "working relationships with contractors, subcontractors, DCPO staff and agency representatives." In the end, the criterion does little more than invite public officials to consider, in evaluating an application, their own "working relationships" with that applicant -- an invitation which exposes the Commonwealth to favoritism.

Failure to articulate specific selection criteria at the outset, to include those criteria in the public notice, and to apply only those criteria virtually guarantees that the selection will, at best, be arbitrary. When the selection criteria are vague:

- Applicants must guess at the rules by which they will be judged.¹⁹

Without full knowledge of the standards against which they will be judged, firms cannot rationally determine whether to apply for the contract. An applicant must guess at the information the DSB (and, later, the DCPO) will deem important or even relevant. An applicant cannot make an internal, responsive choice about which people -- or joint venturers or subconsultants -- to offer the Commonwealth in order to get the job done best. Turning the selection process into a guessing game is not fair to applicants. Nor is it prudent for the Commonwealth: the best firm may be overlooked simply because it made the wrong guess.²⁰

- The DSB cannot apply vague criteria consistently or fairly.

Criteria such as "working relationships" or "depth of the firm" can mean almost anything to anyone. Each Board member must measure applicants against a ruler that is infinitely elastic. As the Ward Commission said, without clear, specific criteria, "there is no guarantee that all DSB members are applying the same criteria for selection on any particular project" ²¹

¹⁹In its Report, the Ward Commission commented that, in the absence of "specific criteria for selection of designers for individual projects . . . legitimate designers have little to guide them in deciding whether or not to apply for a job" (Volume 7, p. 199).

²⁰This EIR project was advertised as one of 18 in a single public notice. The public notice included the DSB's boilerplate list of the general selection criteria applicable to all 18 projects. For this particular project, six areas of technical expertise, and experience in "preparation of environmental impact reports" and "corrections facilities programming, planning and/or design" were listed as requirements. The interplay, if any, between the list of required specialties and the boilerplate list of general criteria was not indicated. For instance, a firm had to guess whether "geographical location" would be applied to the geographical location of the parent firm, the subconsultants and/or the employees assigned to the job or to the geographical location of the sites previously analyzed by the parent firm. There was no clue as to the relative importance of the "geographical location" criterion.

²¹Report, Volume 7, p. 199.

- The selection is vulnerable to favoritism.

An arbitrary process, with vague or hidden rules, puts a premium on inside information. Also, the outcome can too easily be tipped towards someone's favorite. Moreover, without clear selection criteria, applicants are more likely to perceive the Commonwealth's decisions as arbitrary and unfair.²² Suspicion and accusations, even if undeserved, are more likely.

- The DSB has no clear, defensible basis for ranking applicants and articulating the reasons for that ranking.

The lack of project-specific selection criteria deprives the DSB of a sound basis for differentiating among applicants and ensuring that the most qualified applicant is, indeed, ranked first. The DSB's statutorily mandated charge to communicate the reasons for that ranking becomes virtually impossible.²³

In its Report, the Ward Commission discussed deficiencies in the pre-1980 design contract award system. Chief among its concerns was the DSB's failure to "establish specific criteria for selection of designers for individual projects."²⁴ The Ward Commission was unequivocal in its call for specific criteria to ensure an open, fair selection:

Selection criteria are a prerequisite to every selection procedure. . . . [They] should be based on the program for the project and may be weighted. Criteria must be adopted before applications are requested to enable unqualified designers to refrain from applying and to guarantee the integrity of the process. . . . All review and screening of applicants must be based entirely on the project criteria.

²²In its analysis of the pre-reform DSB, the Ward Commission commented that ". . . many designers feel the DSB selection process is at best arbitrary." The Commission attributed this perception to the DSB's failure to establish criteria specific to each project. [Report, Volume 7, p. 199].

²³See Finding 4 for further discussion of the need to state the reasons for ranking finalists.

²⁴Report, Volume 7, p. 199.

Information about any firm used to measure how well they meet criteria should be limited to items of record, whether from the application form, from an affirmative inquiry by the DSB, or from knowledge of the firm held by DSB members.²⁵

The Ward Commission acknowledged that defining project-specific selection criteria would require a collaborative effort of DSB and DCPO staff.²⁶ In this case, it appears that the DCPO and the DSB staffs together failed to identify adequate criteria specific to this project.²⁷ The Inspector General attributes much of this failure to the DSB's lack of staff resources, a matter addressed in Finding 10.

The public notice must articulate specific selection criteria which will be used in selecting the consultant.

Recommendation 5. The DSB, in collaboration with the DCPO, should identify clear, specific selection criteria before applications are solicited, state those criteria in the public notice, and ensure that only those published criteria are applied in the selection.

²⁵Report, Volume 7, pp. 237 and 239. In the Inspector General's view, "knowledge of the firm" should not include impressions or anecdotal information, but rather should be based on references and evaluations recorded and filed with the DSB. The Ward Commission report is consistent with this view. See footnote 51 of this report.

²⁶Report, Volume 7, p. 237.

²⁷The DSB Executive Director reviewed a draft public notice and recommended changes which the DCPO incorporated in the next draft. The changes were minor. During interviews with the Office, the DSB Executive Director said that DSB members do not see the public notice until after it is published and do not, typically, discuss the criteria until the meeting in which the DSB reviews and ranks the applicants.

Finding 4.

The DSB, In Failing To State Its Reasons
For Its Ranking Of The Finalists,
Did Not Comply With The Law

The designer selection statute describes explicitly what information the DSB must provide to the DCPO. G.L. c.7, §38F(c) states, in part, that:

c) The board shall transmit a list of the chosen finalists to the deputy commissioner [of the DCPO]. . . . [and] all material made or received relating to such recommendation.

The list shall rank the finalists in order of qualification and include a record of the final vote of the board on the selection; and include a written statement explaining the board's reasons for its choice and its ranking of the finalists. [Emphasis added].

The DSB transmitted all documents relating to its recommendation as required by law. However, the official explanation of the ranking contained in the DSB Executive Director's March 20, 1987, letter to the Deputy Commissioner is sparse in the extreme:

WCH Industries, Inc. was ranked first to prepare the EIR on the proposed conversion of the above facility to a medium security prison as this multidisciplined engineering firm, in conjunction with its team of consultants, possesses the technical staff necessary to perform the required services in a most expeditious and professional manner.

This statement communicates almost nothing about the reason for ranking WCHI first; it fails to articulate any reason whatever for ranking CPM second or BSC third. In failing to state its reasons for ranking the three finalists, the DSB did not comply with the law.

The DSB's failure to state its reasons for the ranking of each of the three finalists is not unique to this case. The practice is, in fact, described in an April 21, 1983, memorandum from the DSB Executive Director to the Board concerning voting procedures.²⁸ During interviews with the Office, the Executive Director said that the reasons for this practice included the increasing DSB staff workload, the speed with which applicants are ranked by the DSB, and the DSB's desire not to dictate to the DCPO which firm should be selected.

Two DSB members interviewed by the Office expressed considerable reluctance to be more explicit about a firm's relative qualifications in a public meeting. One of those interviewed was concerned that the Board's specific comments on the reasons for ranking a firm lower than first place might prejudice the public -- or the Commonwealth -- in future dealings with that firm.²⁹

The DSB's practice is inconsistent with the letter and the intent of the law. In fact, the Ward Commission did want the DSB to constrain, if not dictate, which firm the DCPO would select. In discussing weaknesses in pre-Ward Commission selection procedures, the Commission quoted a 1975 report of the Massachusetts State Association of Architects (M.S.A.A.):

²⁸The Board included this memorandum in its annual reports for 1983, 1984, and 1985 as a statement of policy on certain administrative procedures. According to DSB staff, annual reports covering 1986, 1987, and 1988 have not been published due to other demands on staff resources.

²⁹In writing about Board policy, the DSB Executive Director also explained that, in some cases, the differences among firms were slight and thus a prepared statement of the ranking might suggest "an unwarranted degree of precision in the process by which the Board arrived at its decision." [April 21, 1983, memorandum from the DSB Executive Director to the Designer Selection Board members].

The [M.S.A.A.] Committee believes that the two stage nomination/selection process, involving [the] DSB and A&F, contains certain inherent hazards. The Committee was struck by a view at the DSB level that, as A&F was required to make the final choice, [the] DSB was absolved of ultimate responsibility for designer selection; while A&F, in making its choice, took comfort from the fact that all the names before it had been carefully screened by [the] DSB, and it would, therefore, avoid criticism as long as it chose from the three.³⁰

Clearly, the Ward Commission was concerned with accountability, including the DSB's responsibility to provide ample explanation of its choice and the basis for its ranking. In partial response to this issue, the Ward Commission reforms mandated the following:

The Deputy Commission[er] [of the DCPO] must be provided not only with the names of recommended firms in ranked order, but also with information from the DSB on the criteria used, and how those firms meet the criteria. . . . The Deputy Commission[er] will have to justify in writing any award to a finalist other than the highest ranked, and the justification is to be based on the criteria established for the project or on his/her failure to successfully negotiate a reasonable fee with that finalist.³¹

Official minutes and notes taken by DSB support staff in the March, 1987, meetings of the DSB provided no clue as to the reasons for ranking the applicants in this case.³²

³⁰Report, Volume 7, p. 205, quoting from the M.S.A.A. Report, 1975, p. 13.

³¹Report, Volume 7, p. 237.

³²See Finding 3 for discussion of the need to establish all project-specific criteria before applications are requested. See Finding 9 for discussion of the need to document decisions.

The DSB must comply with the law.

Recommendation 6. The DSB should transmit to the DCPO, with each list of finalists, a clear and unambiguous statement of the reasons for the ranking of each finalist, based on the published evaluation criteria.

The absence of project-specific selection criteria, discussed at length in Finding 3, renders virtually impossible fulfillment of the DSB's statutory responsibility to articulate its reasons for ranking finalists. The DSB cannot effectively implement Recommendation 6 unless it first complies fully with the requirements of Recommendation 5. Moreover, the DSB cannot effectively implement either recommendation without sufficient staff. (See Finding 10.)

Finding 5.

The DSB Failed To Fulfill Its Statutory Mission
By Improperly Relying On The DCPO
To Review The Applicants

In the March 20, 1987, letter transmitting the DSB ranking to the DCPO, the DSB Executive Director stated:

It should be noted that the Board received only 3 applications for this project and requested supplementary material from the applicants which is attached. In view of the limited response to this project, the Board recommends that [the] DCPO reviews [sic] the attached material to satisfy themselves [sic] that the firm appointed to this project is available to provide the resources required for a controversial project of this magnitude and complexity. [Emphasis added].

Interpretations of this statement vary substantially among those interviewed by the Office. One DSB member recalled that the top-ranked firm was clearly qualified, and the DSB simply wanted the DCPO to assure itself that WCHI had the staff readily available to conduct what promised to be a challenging study. Another DSB member suggested that the DSB was only recommending applicants, and it was the DCPO's prerogative to make the final selection based on its own assessment. Yet another Board member abstained from voting because of his discomfort with the limited applicant pool.

DCPO staff interpreted the statement as an indication that the DSB was, in essence, opening the door to further interviews by the DCPO. Seemingly warned, in effect, that the DSB was dissatisfied with its own work, the DCPO elected to interview the firms. These interviews were inappropriate in at least two respects.

First, the conduct of interviews by the DCPO infringed on the DSB's role in selecting and ranking applicants. The designer selection statute specifically states that the DSB may require all applicants or semi-finalists to appear for an interview before the Board.³³ The statute makes no provision for interviews by the DCPO. The reason is clear: if the DSB performs its mission with care, there should be no need for interviews by the DCPO.

Second, the DCPO used an interview process that was vulnerable to favoritism and arbitrariness in at least three respects:

- Not all criteria used by the interviewing committee were published in the public notice.³⁴
- The true purpose of the interviews was not clearly communicated to all competitors.³⁵
- Interviews and meetings were not adequately documented.³⁶

According to DCPO staff, in the last year the DCPO has increasingly undertaken applicant interviews to identify the best qualified firm. This practice suggests that the DCPO will not routinely rely on the DSB to identify the most qualified candidate.

³³G.L. c.7, §38F(b).

³⁴See Finding 6 for a discussion of the DCPO's failure to articulate to the DSB all selection criteria to be included in the DSB's public notice.

³⁵See p. 5 for an excerpt from WCHI's letter protesting its treatment in the interview process.

³⁶See Finding 9 for a discussion of the need to document the bases for decisions as they occur.

Where interviews are useful, they should, in accordance with the statute, be performed under the auspices of the DSB.³⁷ Further interviews by the DCPO are at best redundant and at worst undermine a fair and orderly selection process.

The Office recommends that the DSB reassert its prerogative -- and, indeed, its obligation -- to ensure that the three firms it ranks and transmits to the DCPO are fully qualified and that, in fact, the top-ranked firm is the best qualified on the basis of clear and publicly stated criteria.

Recommendation 7. The DSB should conduct thorough reviews, including all interviews, with its own staff and board members.

Recommendation 8. The DCPO should cease the practice of conducting its own interviews of applicants for design contracts.

³⁷The DSB has, on occasion, invited the DCPO to conduct interviews jointly with the DSB, according to a Board member who spoke with the Office. Such an approach may be a means of providing the DCPO with information on applicants without usurping the DSB's role in the selection process.

Finding 6.

The DCPO Compromised Fair Competition By Using Selection Criteria Which Were Not Articulated In The Public Notice

The DCPO Deputy Commissioner included the following statement in his May 28, 1987, letter to the DSB justifying his decision to withdraw the appointment from WCHI (the first-ranked firm) and to select CPM (the second-ranked firm):

DCPO staff interviewed WCH Industries, Inc. and Capital Program Management, Inc. . . . and found that the CPM team had significantly more experience in corrections EIR work than WCH Industries, Inc. The CPM team listed over thirty major corrections projects which included EIR studies. The CPM team had substantial experience related to the location of corrections facilities in hostile communities and had made numerous presentations to such groups.
[Emphases added].

While the Deputy Commissioner's explanation may seem plausible on first reading, his rationale does not withstand closer scrutiny. In passing over the top-ranked firm, the DCPO introduced a selection criterion ("corrections EIR work") which was not explicitly articulated in the public notice. Furthermore, the DCPO applied a second criterion (experience with "hostile communities") which was unadvertised and of questionable relevance.

"Corrections EIR Work"

In August, 1986, the Executive Office of Environmental Affairs (EOEA) notified the Department of Correction (DOC) that an EIR was required for the New Braintree project. The EOEA's letter detailed the EIR scope and included the following study

elements:³⁸ traffic, hydrogeology, sewage disposal, water supply, lighting, agriculture, history and archaeology, and the socioeconomic impacts of this facility at this site.³⁹

The DSB's public notice, which was drafted by DCPO staff, required the applicants to list persons with expertise in the following disciplines:

- | | |
|---------------------------|----------------------------------|
| 1. EIR specialist(s) | 4. Civil, Sanitary and Soil Eng. |
| 2. Hydrogeologist | 5. Traffic Engineer |
| 3. Corrections specialist | 6. Archeologist |

The public notice also required past experience in both preparation of environmental impact reports and corrections facilities programming, planning and/or design.

Both firms provided additional material to supplement their original applications. Each firm demonstrated expertise and experience in the areas requested by the DSB. WCHI's material showed extensive environmental impact work in Massachusetts; CPM's material listed extensive environmental and other work related to correctional facilities, primarily outside of Massachusetts. The DSB, based on this information, chose WCHI as the best firm for the job.

³⁸This report lists only the study requirement topics. The full text of Secretary Hoyte's August 8, 1986, letter appears in the Final EIR (Vol. 3: Appendix A; pages 1-4).

³⁹The EOEA letter acknowledged that some of these issues (i.e., socioeconomic impacts) "were not within the strict jurisdictional purview of MEPA," but encouraged the DOC to include discussion of these community concerns in the EIR. In his June 27, 1988, letter certifying the Draft EIR and specifying areas which must be addressed in the Final EIR, the Secretary of EOEA reiterated this recommendation.

The DCPO, after interviews, reversed the DSB's choice, based, in part, on the fact that while both firms had EIR experience and both possessed corrections expertise, what the DCPO now preferred was that the consultant's past environmental reports have been written specifically for correctional facilities. This new slant put CPM at a distinct advantage.

The fundamental problem with recasting selection criteria midway through the process is the vulnerability to favoritism which can result. Once the applications are on the table, a plausible rationale for any choice can be constructed if the selection criteria can be reformulated. If "corrections EIR work" was an important basis for selection, it should have been stated in the public notice; indeed, WCHI should not have applied, since its extensive environmental work related to other types of facilities.

DCPO, having failed to advise the DSB to advertise this criterion, decided after reviewing the applications and interviewing the applicants, that this factor was decisive. Even if the DCPO were correct, and it discovered the omission of an important criterion after the competition had begun, the only fair way to proceed was to ask the DSB to readvertise, publishing the new rules. This the DCPO failed to do.

Moreover, it appears, for at least three reasons, that the DCPO's distinction between EIR work and "corrections EIR work" has little meaning. First, the August, 1986, EOEa letter and the DSB public notice reflect the need for engineering and scientific background relating to the preparation of environmental impact reports (e.g., traffic analysis, hydrogeology, sewage disposal, and archaeology of the area). Obviously, some types of facilities -- a nuclear power plant, for example -- may present specialized problems in assessing environmental impacts. But the EOEa notification and the DSB

notice indicate that the potential environmental impacts of a correctional facility (as with any proposed public construction project housing significant numbers of people and drawing significant numbers of employees and visitors) would depend not on the daily activities within the buildings but rather on the size of the project, the number of people present within the facility, and the physical attributes of the site. The relevant documents suggest that correctional expertise, while not irrelevant, was of peripheral significance to preparing an environmental impact report.

Second, the DSB, possessing submissions detailing the environmental expertise of both firms, chose WCHI as the better-qualified firm. The DSB knew that the project was a correctional facility. CPM's written materials clearly demonstrated substantially greater experience than WCHI in dealing with correctional facilities.⁴⁰ The DSB evaluated the experience of both firms. And it evidently perceived no

⁴⁰CPM's original application said: "CPM and its principals have worked with MFI [co-applicant] for over six years on many projects - most of which were and are prison related." CPM listed master planning and programming work for Essex and Bristol County jails and houses of corrections among the projects which best illustrated its qualifications for this project. An attached list of CPM/MFI's recent projects included "Prison System Expansion EIS Work: 24 Environmental [sic] Assessments, Various locations, New York State." CPM's supplemental material included the qualifications of its "corrections specialist."

In its original application, WCHI, on the other hand, stated that it had "extensive experience in the areas of air/water/soil data collection, data analysis, environmental planning, master planning, environmental analysis, economic analysis . . . civil and transportation engineering studies, architectural and engineering services, [and] traffic engineering. . . ." WCHI listed site assessments and environmental impact work (in areas such as hazardous waste, traffic, and noise) for the Boston Redevelopment Authority and the MWRA among its relevant experience. WCHI responded to the DSB's requirement for a "corrections specialist" in its supplemental material.

compelling advantage in using the firm whose environmental work focused on prisons rather than on a range of other types of facilities.

Finally, the EIR itself reflects, almost entirely, the need for expertise in environmental matters. Volume 1 contains the summary, project description, existing conditions, impacts, alternatives and proposed mitigation sections.⁴¹ Volume 2 contains responses to the public comments submitted on the Draft EIR (issued in May, 1988); the responses in Volume 2 do not demonstrate that CPM, in fact, drew upon "corrections EIR" experience that WCHI lacked. Moreover, with respect to information pertaining to correctional matters, the first two volumes of the report rely mainly on data provided by the Massachusetts Department of Correction (DOC) and appear to have involved little or no raw data collection or analysis.

The third volume of the three-volume report contains the scientific core of the entire report.⁴² These appendices reflect no need for correctional expertise.

Thus, the DCPO compromised fair competition by belatedly invoking its criterion of "corrections EIR work." Moreover, its summary conclusion that CPM possessed clearly superior,

⁴¹A portion of Volume 1 focuses, in conformance with the Secretary of Environmental Affairs' letter, on the socioeconomic impacts (public safety, schools, housing) of the proposed facility on the community.

⁴²The Appendices include: MEPA documents; project site soil borings, water quality tests, memoranda regarding existing sewage lagoons and abandoned off-site landfill; plants and animals; traffic; air quality; archaeology; well pump testing data; hydrological report; zone II computer modeling study; runoff calculations; aquifer volume; aquifer concentrations of sodium and nitrogen; flood study; two DOC memoranda on inmate voting rights; lighting impacts; wastewater treatment plant feasibility report; and asbestos report on existing buildings.

relevant experience appears to be founded on a faulty assessment of what experience was required to produce this environmental impact report.

Experience with "Hostile Communities"

The Deputy Commissioner's May 28 letter to the DSB further argues that CPM possessed "substantial experience related to the location of corrections facilities in hostile communities and had made numerous presentations to such groups." This criterion, too, was never advertised. In addition, the conclusion that CPM had superior community relations experience was of doubtful validity, on the one hand, and of questionable relevance, on the other.

Both firms provided information regarding their experience in writing EIRs on controversial projects, and both firms -- in response to the DSB's subsequent request -- provided information regarding personnel with expertise in dealing with citizen concerns about the presence of controversial facilities in their communities. In bypassing the DSB's top choice, the DCPO failed to demonstrate that WCHI's community relations expertise fell short of CPM's. The DCPO's conclusion was apparently based on the vague and undocumented impressions of the DCPO staff during interviews with representatives of the two firms. Two months after the interview with WCHI, the Deputy Commissioner wrote (in response to WCHI's protest) that CPM's interview responses were deemed "more precise, insightful and focused." There are obvious dangers in relying on these impressionistic bases for awarding public contracts.

The Inspector General has a more fundamental concern, however, with the DCPO's evaluation of community relations

skills⁴³ in this selection. The Inspector General questions the relevance of community relations skills in selecting a consultant to write an environmental impact report -- an undertaking which, by definition, focuses on the environmental impact of the proposed project, not the public relations impact of the report. In any event, community relations skills played virtually no part in the consultant's EIR work.⁴⁴ DCPO staff indicated to the Office that CPM staff had attended one public hearing.⁴⁵ Most data were obtained from official sources and did not require direct contact with individual community members.

Ensuring open and fair competition -- and, thus, eliminating the reality or appearance of favoritism -- was a fundamental concern of the Ward Commission. In its Report, the Commission stated:

The process must proceed and be recorded in such a way as to make clear that the selection flowed from the criteria, not vice versa and not from any hidden criteria such as political influence, friendship, or personal gain.⁴⁶ [Emphasis in original text].

⁴³During interviews with this Office, DCPO staff avoided reiterating the Deputy Commissioner's reference to "hostile communities" and instead referred to "community relations skills" and the "sensitivity" of the community's concerns over the proposed corrections facility. DCPO staff said that the term "hostile communities" should have been deleted from the DCPO's May 28, 1987, letter to the DSB.

⁴⁴An individual with expertise in conducting EIR studies was interviewed by this Office. He indicated that typically, community relations skills would be restricted to public hearings and situations where field data were to be collected from members of the community.

⁴⁵DCPO staff said that only one public hearing was held (June, 1988).

⁴⁶Report, Volume 7, p. 229.

The DCPO did not devote adequate resources at the outset to identifying the criteria against which applicants would be judged, nor did the DCPO ensure that all selection criteria were included in its draft of the public notice.⁴⁷ By failing to ensure that the "selection flowed from the criteria, and not vice versa," the DCPO (and the DSB) became vulnerable to favoritism, thereby exacerbating the type of controversy the DCPO had hoped to mitigate.

Both agencies neglected an important safeguard and compromised the fair and open selection of a consultant in this instance. In the future, the DCPO must collaborate with the DSB to identify all selection criteria before applications are solicited, ensure that the criteria are tailored to the actual needs of the project, and award the contract based solely on these criteria. (See Recommendation 5.)

⁴⁷See Finding 10 for discussion of the need for additional DSB staff resources and Finding 3 for further discussion of the DSB's role in formulating selection criteria.

Finding 7.

The DCPO Rejected, Through A Process That Was Vulnerable To Favoritism, The Firm That Had Been Ranked First By The DSB

After receiving the DSB's list of applicants, the DCPO Director of Programming sent WCHI, the top-ranked firm, a routine notice stating that its services had been authorized.⁴⁸ A month later, the Deputy Commissioner of the DCPO withdrew the appointment of WCHI in favor of CPM, the firm the DSB had ranked second.

DCPO staff has since maintained that the original appointment of WCHI was an error -- that the notification form was generated as a matter of routine based on the DSB's ranking and signed in error by the Director of Programming. The Office found no documentation either to support or to refute the DCPO's explanation of an "error." None of the contemporaneous official correspondence in the Office's possession alludes to an "error."⁴⁹ Rather than being an error, the appointment of WCHI in accordance with the established routine seems to have been appropriate. The DSB had identified WCHI as the most qualified firm.

The decision to bypass WCHI, a minority-owned firm, was the product of a flawed interview process and the use of criteria which were not included in the public notice and of

⁴⁸The letter was dated April 24, 1987, and stated the action had been approved by the Deputy Commissioner on April 3, 1987.

⁴⁹Memoranda written by DCPO staff in June, 1988, to recount and explain this sequence of events do describe the initial award to WCHI as inadvertent. However, this Office's review showed no evidence that the DCPO acknowledged this error to either the DSB or the applicants during or immediately following the selection process.

questionable relevance.⁵⁰ As a result, the quality of decision-making was compromised and the DCPO's selection process was vulnerable to bias.

The vulnerability of this process to favoritism is underscored by a statement to the Office by one of the participants in the selection process. One DCPO staff member said he inclined toward the selection of the second-ranked firm, in part because he was personally familiar with its work in a previous DCPO project. While past performance of a firm is obviously relevant in a selection, the personal familiarity of a participant in the agency's selection process -- particularly when the process is as unstructured and undocumented as the DCPO's in this case -- tends to favor consultants who are "insiders."⁵¹

An unstructured interview process puts a premium on salesmanship by competing firms, deflecting attention from the firm's qualifications to perform the work. In recalling the interviews, DCPO staff said they reached consensus on CPM immediately following the CPM interview. Their decision, staff said, was based, in part, on the "bearing" of the firm's representative and the confidence his presentation inspired. DCPO staff said they doubted whether the other firm was "up to"

⁵⁰See Finding 6 for discussion of this issue.

⁵¹The Ward Commission was concerned about this danger. Its criticism of the DSB as then-structured applies equally to any process where selection criteria are not fully articulated ahead of time. The Ward Commission stated:

[T]he most frequently used criterion in the selection process is each individual DSB member's personal knowledge and opinion of the applicants. . . . [T]he members must rely upon information from 'verbal grapevines' regarding applicants. A small or new firm, which is unknown to the board members, may have a hard time getting a DSB job. (Report, Volume 7, p. 199.)

dealing with citizens who were resistant to siting a prison in their community.⁵²

One staff member explained that "lots of things come through [in the interview] not included in the application." Another said that the "way a person presents themselves [sic] is important. . . . [A] structured series of questions doesn't allow them to present their strengths."

A structured, published selection process is mandated precisely to reduce the possibility of selection based on "lots of things" that applicants have but were unadvertised, the "way a person presents" himself in what amounts to a sales presentation, or the confidence a spokesperson's "bearing" inspires.

The DCPO's unstructured interviews permitted consideration of factors which have no place in a fair, competitive selection. Only criteria which have been approved by the DSB and communicated to the participants should enter into the decision-making process. While the Office does not question the dedication or good intentions of the participants, the process the DCPO used was vulnerable to abuse.

The Deputy Commissioner has legal authority to bypass the DSB's top-ranked firm.⁵³ This authority is appropriately invoked in limited circumstances -- for example, when a reasonable fee cannot be negotiated with the top-ranked firm,

⁵²See Finding 6 for a discussion of the irrelevance of this consideration.

⁵³The designer selection law permits the DCPO to select other than the top-ranked firm if the Deputy Commissioner files a written justification of the appointment with the Board. [G.L. c.7, §38G(a)].

or when the top-ranked firm declines the contract.⁵⁴ To protect the Commonwealth's interest in a fair and open selection process, the Deputy Commissioner should not, however, bypass the top-ranked firm unless there is a compelling reason to do so. Moreover, that compelling reason must be based solely on advertised criteria, to avoid both the appearance and the reality of favoritism.

Recommendation 9. The DCPO should award a design contract to the top-ranked firm unless there is a compelling reason to bypass that firm, and ensure that a decision to award to the second-ranked firm is based solely on published criteria and fully explained in writing.

⁵⁴Both DSB members and DCPO staff stated in interviews with the Office that the DCPO rarely selects the second-ranked firm and virtually never selects the firm in third place.

Finding 8.

The DCPO, Circumventing Essential Safeguards Against Fraud, Waste and Abuse, Permitted The Cost Of The Contract To Escalate From An Advertised Fee Of \$75,000 To More Than \$535,000

At the request of the DCPO, the DSB advertised the EIR consultant contract at a \$75,000 fee plus "reimbursables." The public notice stated that field data collection (tests, surveys, etc.) would be considered reimbursable expenses. According to the contract which was later executed with CPM, the firm would be reimbursed its actual expenses of subcontracting for these services plus a 10 per cent "coordination and responsibility" fee.⁵⁵

According to at least one DSB member, reimbursable expenses should amount to no more than 10 to 20 per cent of the advertised fee and be limited to such incidental expenses as copying and postage. Another DSB member indicated that up to 15 to 25 per cent over the advertised fee might reasonably be expended to collect field data before the DSB would be concerned.

By July, 1988, the DCPO had authorized the "reimbursables" under the contract to escalate to \$570,000; the consultant's "fee" remained \$75,000. Thus, what appeared to the DSB to be a relatively small study in November, 1986, could be a \$645,000⁵⁶

⁵⁵Where CPM itself performed an "extra" service, the 10 per cent coordination fee would not apply, although the cost of the service would be handled as a reimbursable expense.

⁵⁶According to documents provided by the DCPO, a total of \$537,039.80 had been expended for the study fee and reimbursables as of April 25, 1989. DCPO staff contacted by the Office said that the contract had not been closed out. DCPO staff did not anticipate expending all the authorized (continued...)

undertaking -- more than eight times the amount publicly advertised.

What had happened? And why was the DSB unaware of the magnitude of the project from the outset?⁵⁷ The answers can be found in the manner in which the DCPO planned, budgeted and procured additional services from the consultant.

DCPO staff did not include field data collection as part of the scope of the design contract. According to DCPO staff, at the time the public notice was drafted in the fall of 1986, the DCPO had insufficient data for anticipating field data collection costs.

The DCPO acknowledged that the amount of "reimbursables" expanded well beyond their initial estimates,⁵⁸ and cited the following contributing factors:⁵⁹

- unanticipated underground formations which expanded the type and degree of testing required;

⁵⁶(...continued)
amount, but did not know with certainty what the consultant's final billing would be.

⁵⁷Until they were interviewed by this Office, DSB members were unaware of the magnitude of work performed by the EIR study consultant and its subcontractors. According to the Board members, consistent with past practice, the DCPO did not provide the DSB with an estimate of "reimbursables" at the time the study was advertised, nor with information as the amount soared.

⁵⁸Documents provided by the DCPO show several budget estimates during late spring and summer of 1987. The executed contract with CPM shows \$75,000 for the designer's fee. Documents provided to the Inspector General indicate that, along with the executed contract in August, 1987, the study consultant was provided with documents generated by the DCPO which estimated \$93,000 for reimbursables.

⁵⁹This is an abbreviated listing based on the Office's interviews with DCPO staff members.

- the need for site boundary data which staff erroneously assumed was available from the owners;
- questions and concerns of the public and the EOEa which required additional data collection and analysis; and
- the impact of cold weather on the subconsultants' ability to complete testing.

The Office does not question whether the work performed to complete the EIR was necessary, nor does this report dispute the DCPO's view that nine to twelve months to complete the testing and to draft the report is a reasonable length of time for a study of this complexity. The Office does question the method the DCPO chose to procure testing and survey services.

During interviews with the Office, DCPO staff expressed the view that "reimbursables" are an issue between the designer and the DCPO, and that the DSB has no role -- indeed, the DSB need have no knowledge -- of the scope or price of these services. The DCPO seems to regard the prospect of DSB involvement in the procurement of "reimbursable" services as unnecessary and time-consuming.

Such a view is clearly contrary to the letter and the intent of the designer selection law. That law charges the DSB with jurisdiction over all design services where the estimated construction cost on a State building project exceeds \$10,000 or the design fee exceeds \$2,500.⁶⁰ By statutory definition, surveys and soil tests are design services,⁶¹ and consultants must be selected through the DSB. In the Office's view, the

⁶⁰G.L. c.7, §38C(a) and (e). The Inspector General supports legislation which seeks to increase the thresholds to \$50,000 for estimated construction costs and \$5,000 for design fees. These increases would allow the DSB to focus its efforts on somewhat larger projects.

⁶¹G.L. c.7, §38A½(b)(iv)(i).

DCPO's failure -- or inability -- to define the scope of the testing services did not relieve the DCPO of its responsibility to return to the DSB at the point when the need for the extra services became evident.

It is a fundamental precept of public procurement law in Massachusetts that contracts which are subject to competitive award may not be significantly increased without further competition. If the dollar value of a contract is increased beyond an incidental amount, the new work must be obtained in accordance with the applicable procurement law. This requirement is essential to prevent favoritism and waste in public contracts. As the Supreme Judicial Court has said, Morse v. Boston, 253 Mass. 247, 253-4 (1925):

It would be a vain thing for the Legislature to establish these safeguards for the public treasury to govern the initial execution of a contract and yet to permit all the evils thus prohibited to be accomplished by amendment or alteration of such a contract when once executed. . . .

The argument of inconvenience, arising from the possibility of having two different contractors working upon the same job, if there must be another advertisement and award of contract under the statute, is not impressive. Mere inconvenience does not warrant departure from a statutory mandate.

Here, under the guise of an open-ended category of services labelled "reimbursables," the DCPO administratively converted -- without the competition required by law -- a \$75,000 contract into a \$645,000 contract. The DCPO has argued that its procedures governing the procurement of "reimbursables," which require quotes and preapproval by the DCPO, were adequate to protect against fraud, waste and abuse. The DCPO maintains that those procedures served as a satisfactory practical alternative to going to the DSB. The

DCPO is mistaken. There is no satisfactory alternative to abiding by the law.

The designer selection law requires a total fee to be set by the DCPO,⁶² advertised,⁶³ and stated in the contract as a total dollar amount.⁶⁴ No provision is made in the law -- nor can it prudently be justified -- for multiplying this fee, at the discretion of the DCPO, as the contract progresses. The "reimbursables," in the end, could constitute more than 85 per cent of the contract. The advertised contract amount was rendered a virtual fiction.

The DCPO compounded its imprudence by turning over to the consultant much of the responsibility for obtaining the extra services and by building in a financial incentive for higher prices. For example, the designer informed the DCPO in March, 1988, that extra services for topographical survey field data collection in the amount of \$135,300 were needed. Of this amount, \$123,000 was for CPM's subcontractor and \$12,300 for CPM as its 10 per cent "coordination" fee. Had CPM obtained a lower price for the survey, its coordination fee would also have been lower. This cost-plus-percentage-of-cost fee arrangement invites inflated prices and is inconsistent with the designer selection law.

⁶²G.L. c.7, §38(G)(b), also permits the Deputy Commissioner to negotiate the fee for designer services, but the fee cannot exceed the maximum fee established before finalists were selected.

⁶³The public notice shall contain a statement as to "whether the fee has been set or will be negotiated, and if the fee has been set, the amount of the fee." [G.L. c.7, §38D(b)(v)].

⁶⁴G.L. c.7, §38G(c).

The law states: "All fees shall be stated in designer's contracts and in any subsequent amendment thereto as a total dollar amount."⁶⁵ [Emphases added]. Failure to include "reimbursables" in the total dollar amount of the contract violates this provision. Moreover, payment of a percentage add-on also violates this provision. The Ward Commission sought to prevent precisely this type of open-ended fee arrangement.

The DCPO should discontinue its current use of "reimbursables" and "coordination fees" to obtain services in addition to those for which the fee is established in the advertised contract.

Recommendation 10. The DCPO should include all design services for which a consultant will be responsible, whether directly or through a subconsultant, in the advertised scope of services.

Recommendation 11. The DCPO should procure all new or expanded services in accordance with the designer selection law, in the event that unanticipated services are required or significant increases in the scope of work are needed.

⁶⁵G.L. c.7, §38G(c).

Finding 9.

The DCPO And The DSB Inadequately Documented The Selection Process, Thereby Depriving The Public Of An Essential Tool For Holding The DSB And The DCPO Accountable For Their Decisions

In its Report, the Ward Commission stated that "[t]he [selection] process must proceed and be recorded⁶⁶ in such a way as to make clear that the selection flowed from the criteria, not vice versa and not from any hidden criteria such as political influence, friendship, or personal gain."⁶⁷

At various times during interviews with the Office, DSB and DCPO staff members were unable to remember the precise sequence or timing of events or the content of discussions with or about applicants. They had failed to maintain adequate documentation of the selection process. Thus, the Office was unable to determine with certainty whether the criteria were ever presented fairly or whether applicants were provided equal opportunities to respond.

The public has a right to know how and why decisions were made. Without a clear record of those decisions, the public is deprived of a means of holding public managers accountable for their decisions. The DSB must be provided with adequate support staff⁶⁸ and equipment to record its proceedings.

Recommendation 12. The DCPO and the DSB should document each step of the selection process -- as it occurs -- in order to maintain a reasonable record of the basis for their decisions.

⁶⁶Emphasis added.

⁶⁷Report, Volume 7, p. 229.

⁶⁸See Finding 10 for discussion of the need for staff resources.

Finding 10.

The DSB Has Neither Adequate Staff Resources Nor Sufficient Autonomy From The DCPO To Fulfill Its Responsibilities

The Ward Commission recognized in its Report that lack of staff resources can subvert the most diligent efforts of the DSB:

[E]ven if the DSB wanted to set up formal criteria for each job, it would not have the necessary information to apply them.

This lack of information can be traced, at least in part, to a lack of DSB staff to collect and verify information.

. . . It is now apparent that no part-time volunteer board could conceivably collect and use the appropriate information about applicants. . . . The DSB has not had any staff of its own, other than a secretary and an administrative assistant on loan from the BBC [Bureau of Building Construction], with which to administer files . . . to verify information in their [applicants'] applications, to develop and propose specific criteria for individual projects, or to pre-screen applicants on the basis of a scoring system.⁶⁹ [Emphasis added].

These Ward Commission observations of the pre-reform DSB are nearly as accurate today as they were in 1980. Without additional staff, the DSB cannot fully respond to the recommendations in this report.

Additional staff resources are essential to resolve another fundamental problem: the impaired independence of the DSB. At present, the DSB is budgeted within the DCPO and is regarded by the Administration as a part of the DCPO organization. In order to grant salary increases to existing

⁶⁹Report, Volume 7, pp. 200-201.

staff or hire new staff, the DSB Chairman must present his case to the Deputy Commissioner. That case competes with other DCPO programs and priorities -- and frequently loses, as can be seen by the limited number of DSB staff. At present, the DSB staff consists of the Executive Director, an administrative support person and a clerical support person. The DSB currently has no funds for independent legal counsel. Apparently, the Deputy Commissioner of the DCPO determined that other funding needs had a higher priority than the DSB's request for independent legal counsel.

The DSB has quite properly insisted that DCPO staff restrict its oral input during DSB meetings to responding to questions from Board members. The DSB has formulated a written policy for the conduct of agencies during DSB meetings. Nevertheless, due to lack of its own staff, the DSB must rely upon the DCPO for staff analyses and contributions to the decision-making process.⁷⁰ The DCPO controls, to a great extent, the quality and quantity of information the DSB has available. As a consequence, the DCPO has the opportunity to exert undue influence throughout the process of selecting consultants.

The current degree of the DSB's dependence on the DCPO compromises the independence of the DSB's functions and

⁷⁰The DSB Executive Director performs primarily in an administrative capacity and has limited time to analyze selection criteria or to evaluate applicants. The DCPO initially reviews all applications and provides a matrix to the DSB to facilitate its applicant evaluation process. DSB members interviewed by the Office noted that the matrix is used to varying degrees by the Board and generally only for the purposes of disqualifying applicants. DSB members also commented that the DSB presumes that DCPO staff conducts reference checks on the finalists before awarding a consultant contract.

undercuts the DSB role envisioned by the Ward Commission.⁷¹ The following recommendation need entail no additional expenditures. By reallocating a limited number of positions from the DCPO, the Secretary can provide the resources needed to ensure that functions which are properly the DSB's are performed by the DSB.

Recommendation 13. The Secretary of Administration and Finance should take immediate steps to ensure that the DSB is provided with sufficient professional and clerical staff support.

Furthermore, the DSB must have the organizational autonomy so vital to effectively fulfilling its responsibilities. The DSB must have the capacity to hire staff, seek independent legal counsel, provide salary increases, and deploy its resources without the approval of the DCPO.

Recommendation 14. The Secretary of Administration and Finance and the Legislature should separate the DSB from the DCPO, both organizationally and budgetarily.

⁷¹See Appendix A for discussion of the Ward Commission's concerns and recommendations.

APPENDIX A

Ward Commission Reforms

As envisioned by the Ward Commission¹ and subsequently refined by the Chapter 579 Task Force,² the functions of the Designer Selection Board (DSB) and the Division of Capital Planning and Operations (DCPO) are vital elements of a system to eliminate favoritism and corruption in the award of design contracts for public buildings. The Chapter 579 Task Force report summarizes the responsibilities of those two entities as follows:

[The] DSB has jurisdiction over the selection of designers, programmers and construction managers performing design services for State agencies and building authorities whenever the project's construction cost is estimated to exceed \$10,000. These design contracts must be publicly advertised in a newspaper and the Central Register. [The] DSB, composed primarily of architects and engineers, reviews the qualifications of those responding to the advertised contracts and, based on established criteria, selects at least three semi-finalists for each contract award. [The] DSB then sends a list ranking the semi-finalists in order of qualifications to the Deputy Commissioner of the Division of Capital Planning and Operations (DCPO). From that list, the Deputy Commissioner selects a designer for contract award. If the Deputy Commissioner selects a designer

¹The "Ward Commission" is more formally referred to as The Special Commission Concerning State and County Buildings, created by Chapter 5 of the Resolves of 1978, as amended by Chapter 11 of the Resolves of 1979 and by Chapter 257 of the Acts of 1980.

²This task force was assembled by the Inspector General to study various proposed changes in the Commonwealth's system of public building design and construction, based on actual experience in the year and one-half since Chapter 579 of the Acts of 1980 were enacted. The Task Force met from June of 1982 until publication of its Final Report in February, 1983.

other than the one ranked first, he must file a written justification with [the] DSB.³

The Task Force's summary reflects statutory reforms the Ward Commission believed were needed to create an objective and accountable designer selection process.

The Designer Selection Board

The Ward Commission explicitly recommended changes in how the DSB -- first established in 1967 -- would function. Those changes included requirements that selection criteria be specific to each project, that the DSB select rather than recommend three finalists and that the DSB publicly state its reasons for selecting and ranking the finalists.⁴ In summarizing the role of the DSB in an objective and accountable selection process, the Commission stated, in part:

The new designer selection system is structured to foil any attempt to by-pass the Board. The newly constituted Designer Selection Board is required to approve or disapprove any proposals for continuation or extension of work on a project, as well as requests from agencies desiring to use in-house designers.⁵

The Designer Selection Board is an independent board within the Executive Office for Administration and Finance. The majority of the Board is appointed by the Governor. Currently, the DSB is budgeted in the Division of Capital

³Final Report of the Chapter 579 Task Force, February 1, 1983, p. 60.

⁴The Designer Selection Board annual reports provide additional information on how the DSB operates and the types of issues it considers.

⁵Report, Volume 1, p. 6-4.

Planning and Operations -- a fact which is discussed in Finding 9 of this report.

The Commonwealth asks much of the eleven members who have consented to serve on the Designer Selection Board. The Designer Selection statute directs the DSB to employ an executive director and "such other staff or consultants as it may deem necessary, subject to appropriation, for the board."⁶

Members of the DSB are reimbursed for necessary expenses incurred in the discharge of their official duties. The statutory phrase "necessary expenses" in no way compensates this volunteer board for loss of business while engaged in many hours of Board meetings. Nor does it compensate Board members for the opportunity costs caused by ineligibility for public contracts due to statutes defining conflicts of interest.

The Division of Capital Planning and Operations

The centerpiece of Ward Commission reforms (Chapter 579) was the creation of a new agency within the Executive Office for Administration and Finance. This new agency, the Division of Capital Planning and Operations (DCPO), is headed by a Deputy Commissioner who reports to the Commissioner of Administration. The DCPO was created "to clarify responsibility and allow accountability in the management of the Commonwealth's public building system."⁷ The DCPO was envisioned as an integral part of a new management system which would focus "responsibility on individuals and organizational

⁶G.L. c.7, §38B(c).

⁷Report, Volume 1, p. 6-5.

units for decisions and actions."⁸ The Commission's Report further states:

The new process establishes avenues to protect the state's interests in dealings with private firms; likewise, firms are provided fair opportunities for protection of their own interests. Increased access to public contracts is provided to all firms.⁹

The Commission created a unique -- and perhaps delicate -- relationship between the DSB and the DCPO. For instance, in describing the role of professional DSB staff, the Commission recommended that the job include liaison work with the DCPO and "[p]reparation of advertisements, in collaboration with the DCPO. . . ."¹⁰ On the other hand, the Commission expressed its desire to ". . . avoid an imbalance in the influence [exerted over DSB] members [by the DCPO and other agencies], and to focus selection on the basis of the recorded program and information available about applicants. . . ."¹¹

⁸Report, Volume 1, p. 6-4.

⁹Report, Volume 1, p. 6-5.

¹⁰Report, Volume 7, p. 244.

¹¹Report, Volume 7, p. 245.

